STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

April 5, 2022

Michigan Freedom Fund
C/O Tori Sachs
PO Box 14162
Lansing, MI 48901

Dear Ms. Sachs:

The Department of State (Department) acknowledges receipt of your letter dated January 22, 2022, in which you sought a declaratory ruling or interpretive statement under the Michigan Campaign Finance Act (Act or MCFA).

The MCFA and Administrative Procedures Act (APA), 1969 PA 306, MCL 24.201 *et seq.*, require the Department to issue a declaratory ruling if an interested person submits a written request that presents a question of law and a reasonably complete statement of facts. MCL 24.263, 169.215(2). If the Department declines to issue a declaratory ruling, it must instead offer an interpretive statement "providing an informational response to the question presented[.]" MCL 169.215(2). In compliance with the MCFA and the APA's publication and public comment period requirements, the Department posted to its website and informed e-mail subscribers of the receipt of your request on January 28, 2022 and informed them of the deadline to file public comments on the request. To date, no public comments have been received.

As required by section 15(2) of the MCFA, the Department has reviewed your request and determined that it does not contain a sufficient statement of facts to warrant issuance of a declaratory ruling. Accordingly, the Department offers the following interpretive statement as an informational response to your questions, which are set forth below.[1]

1. The Department's authority for lifting the contribution limitation under section 52 when a recall is actively being sought against an officeholder.

The Department understands your first question to reference the Department's December 21, 2021, determination in *Michigan Freedom Fund v. Whitmer* which interpreted decades of precedent regarding whether the contribution limitation was lifted for candidates whose recall

[1] From the outset, the Department notes that your request appears to attempt to relitigate several determinations made in campaign finance complaints you submitted against various individuals. Your questions do not ask the Department to interpret provisions of the MCFA based on your proposed future conduct, but rather ask the Department to provide additional rationale on the determinations made in the complaints. The Department's rationale was thoroughly explained in the determination issued, and the declaratory ruling process is not an appropriate forum to do so.

was actively being sought. Your question presupposes that the Department's determination failed to enforce the MCFA. The Department disagrees. In short, the Department did enforce the Act's contribution limits applicable to a recall effort against a governor, as described in detail in the Department's December 21, 2021, determination in response to your complaint of August 9, 2021. Dating back to 1983, the Department has followed the recall doctrine first espoused in its interpretive statement to William Faust and reaffirmed in two subsequent dispositions. *Interpretive Statement to Faust.*

The Department's 1983 interpretive statement cites the contribution limits in section 52 of the MCFA referenced in your question, but states that those limits apply to a "candidate for state elective office." "Elective office" is defined under the MCFA as "a public office filled by an election, except for federal offices." In a recall effort, no office is being filled by an election; rather, the question is whether to remove the officeholder. Accordingly, the MCFA's contribution limits do not apply to candidate committees operating on behalf of officeholders subject to a recall effort. Subsequent dispositions by the Department—a declaratory ruling to L. Brooks Patterson in 1984 and interpretive statement to Eric Doster in 2011—confirm this position and are discussed in greater detail in the Department's earlier letter to you. *Declaratory Ruling to L. Brooks Patterson*, issued January 3, 1984; *Interpretive Statement to Eric Doster,* issued November 1, 2011.

2. The disgorgement remedy of recall-designated contributions.

Similar to question one, your second question also accused the Department of "deviat[ing] from its usual practice" when instructing committees on how to disgorge themselves of recall-designated contributions. Yet, this question ignores the nearly 40-year-old precedent established in 1983 under *Faust*.

As explained at length in the Department's December 21, 2021 determination, "upon the closing of the recall cycle, the elected official must disgorge all recall-designed contributions." *See Faust.* In response to the determination, the Department clarified its guidance in Appendix P by stating that the election cycle for a recall election ends when any of the following occur: (1) there is no longer an active recall being sought; (2) the date the Board determines the recall election does not factually or clearly state the reason for a recall; (3) the expiration of time for which signatures could be submitted to the filing official; (4) the date in which the filing official determines a submitted recall petition contains an insufficient number of valid signatures; or (5) the date of the special recall election.

Once one of those events has occurred, the committee must dispose of recall-designated contributions. The Department described in its earlier letter that "while the Committee may not continue to raise unlimited contributions, it may retain funds to defend itself against pending litigation surrounding a recall petition, but such funds should be disgorged within 30 days of the closing of litigation in accordance with section 45 of the Act." See MCL 169.245. Section 45 is cited to indicate *methods* of disgorgement, not the rationale for such disgorgement.

You indicate that you believe disgorgement was inappropriate and that excessive contributions should be returned to the contributor. However, this completely ignores the precedent established under *Faust* and continued in subsequent declaratory rulings and interpretive statements with no justification as to why the Department should depart from its decades-old precedent. Since

Faust, the Department has held that, if a recall election is not called, "a contribution designated for the recall election may not be retained unless otherwise designated by the contributor." The contributor may designate that the portion of the contribution not exceeding the limitation be retained by the candidate committee for use in the candidate's next election, and the portion exceeding the limitation returned to the contributor. "Any contribution, or portion of a contribution, not otherwise designated by a contributor in the instance where a recall election is not called, shall be given by the candidate committee to a political party committee or to a tax exempt charitable institution." In *Whitmer*, the Department continued to apply the nearly 40-year-old precedent established by *Faust*.

3. The Department's decision to dismiss the complaint, *Freedom Fund v. Bernstein, et al.*

Your third question directly challenges the Department's determination to dismiss the complaint you filed in *Freedom Fund v. Bernstein, et al*. In this complaint, you alleged that each of the individual contributors violated section 52 of the Act by making contributions in excess of the statutory limits. The Department held this complaint in abeyance pending the resolution of *Freedom Fund v. Whitmer*, and ultimately dismissed it after the determination was made in *Whitmer.* Your question is not correctly stated as what "shields" contributors, as the Department will not issue an interpretive statement advising interested parties on how to avoid the Act's requirements. Rather, your question seeks further justification as to why the Department dismissed your specific complaint.

Throughout the MCFA, the requirements fall at the foot of the candidate and candidate committee, not the contributor. Various sections of the Act require regular reporting on contributors, assess penalties for failure to disclose that information, and prescribe acceptable and unacceptable uses for those funds. See, e.g., MCL 169.226(1) (requiring *committees* to include in their campaign statements "the total amount of contributions received during the period covered by the campaign statement [and] the total amount of expenditures made during the period covered by the campaign statement"); MCL 169.237 (requiring a representative of a *committee* to verify that the representative used "all reasonable diligence" in preparing each campaign statement); MCL 169.252(7) (prohibiting *committees* from accepting contributions in excess of the contribution limits set out in the Act).

Yet, section 52 plainly states that a person shall not give in excess of the contribution limits prescribed therein and establishes penalties. MCL 169.252. While not necessarily a conflict in the language, the practicality is that this plain language creates unequal treatment between donors and committees. Committees exist to conduct political activity, part of which includes soliciting and accepting contributions made by individual donors. An individual donor may, at times, give in excess of the contribution limits for a variety of innocent reasons. For example, the donor may be unaware of what the actual contribution limit is. After all, the Act itself lists the contribution limit to a candidate committee at $6,800. MCL 169.252. Only a separate section of the Act provides that the limit is scaled to the consumer price index every four years, beginning in 2019, resulting in a current limit of $7,150. MCL 169.246. Navigating such intricacies can be expected of a candidate but would be unreasonable to expect of a contributor.

Once a committee has accepted money in excess of the contribution limit, the committee is faced with a choice – a choice that is removed from the donor. Once received, the committee can reject, return or refund, in whole or in part, any excess contribution within 30 business days of

receipt to avoid any violations of section 52. MCL 169.204(3)(c). By contrast, once given, the donor has no way of taking back its excess contribution to avoid violations of section 52.

The Act's provisions correctly place the onus of comporting with the Act on candidates and candidate committees receiving contributions rather than donors who may not have taken steps to familiarize themselves with the rules or contribution limits under MCFA. In the case of the complaint against Gretchen Whitmer's contributors, the Department determined that the resolution of that complaint depended on the resolution of *Michigan Freedom Fund v Whitmer*. This was partly because, as stated above, the experts of whom compliance can be most expected are the committees rather than the contributors, but also for the sake of administrative efficiency and to prevent contradictory outcomes between the two complaints.

To be clear, the Department is *not* suggesting that donors may willfully give in excess of the statutorily proscribed contribution limit and not face potential enforcement actions from the Department. Rather, the Department takes each enforcement action and situation on a case-by-case basis to determine whether a violation has occurred, and what an appropriate remedy may be.

4. The notification and investigation requirements under section 15 of the Act.

Your fourth question asks what authorizes the Department to not provide a notice within five business days. In *Whitmer,* the respondent was notified within five business days, so the Department assumes you are referring to the complaint submitted in *Freedom Fund v. Bernstein, et al.* which was held in abeyance pending resolution of the *Whitmer* complaint.

Insofar as your request suggests that the Department should sacrifice administrative efficiency and refrain from consolidating the investigation and resolution of complaints that are in all material respects identical or interconnected with each other, the Department respectfully disagrees. See, *e.g., Michigan Waste Systems, Inc v Dep't of Natural Resources*, 157 Mich App 746, 756 (1987) ("The purpose of consolidation is to promote the convenient administration of justice and to avoid needless duplication of time, effort, and expense.") (Internal quotations omitted.)

5. When the Secretary of State should recuse herself from an investigation and forward to the Department of Attorney General.

Section 9 of the MCFA states in full,

> The secretary of state shall investigate the allegations under the rules promulgated under this act. <u>If the violation</u> involves the secretary of state, the immediate family of the secretary of state, or a campaign or committee with which the secretary of state is connected, directly or indirectly, the secretary of state shall refer the matter to the attorney general to determine whether a violation of this act has occurred. (emphasis added)

The section governs the recusal process, whereby the Secretary of State must recuse herself and refer the matter to the Attorney General if the alleged violation involves her, her family, or a campaign or committee with which the Secretary of State is directly or indirectly connected. In the instant case, the alleged violation involved the Governor and donors to the Governor's committee, not the Secretary of State, her immediate family, or a campaign committee with

which the Secretary of State is "connected." As such, there is no prohibition on the Department's review of the complaint any more so than there would be for any other complaint.

6. Conclusion

As conveyed to you in the Department's December 2021 determination, the Department correctly applied the contribution limits for a recall election against a governor and required the committee to disgorge excess funds at the conclusion of the recall cycle. The decision to hold in abeyance, and then dismiss, the complaint against contributors to the Whitmer committee was guided by a desire for administrative efficiency, as that complaint was intrinsically linked with *Whitmer*, and to prioritize enforcement actions against committees rather than contributors. Finally, there was no reason for the Secretary of State to recuse herself from the matter, as the complaint did not involve any of the parties she is prohibited from investigating.

In closing, as noted in the disposition to your previous complaint, the Department has not defined the parameters of the recall doctrine since the law was amended in 2012. A good faith effort to seek those answers in the context of prospective actions rather than a rehashing of grievances already considered and dismissed by the Department would be welcome.

Sincerely,